



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO.277 OF 2018

IN THE MATTER OF 22, 23, 27,40,47,50 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF THE FUNDAMENTAL RIGHTS TO A FAIR ADMINISTRATIVE ACTION, PROTECTION OF RIGHT TO OWN PROPERTY, EQUALITY AND FREEDOM FROM DISCRIMINATION UNDER ARTICLES 22,23,27,40,47,50 OF THE CONSTITUTION OF KENYA 2010

BETWEEN

NIXON MURATHI KIRATU.....PETITIONER

VERSUS

THE DIRECTOR OF CRIMINAL INVESTIGATIONS.....1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

THE HONOURABLE THE ATTORNEY GENERAL.....3RD RESPONDENT

AND

MERCY NYAKIO MBURU.....1ST INTERESTED PARTY

JOSEPH MWAURA NGUGI.....2ND INTERESTED PARTY

RULING

1. Before me is an application dated 5th December 2018 pursuant to section 1A, 1B, 3B of the Civil Procedure Act 2010, order 51 rule 15 of the Civil Procedure Rules 2010 and all other enabling provisions of the law. The Applicants are seeking the following orders:-

- a) That this Honourable court be pleased to set aside its orders issued on 10th August 2018 pending hearing and determination of this application interparties.
- b) That this Honourable Court be pleased to set aside its orders issued on 10th August 2018 pending hearing and final determination of this petition.
- c) That this Honourable court be pleased to issue an order of preservation of the motor vehicle subject of this suit pending hearing and determination of this Petition.
- d) That the cost of this application be in the cause.

2. The application is premised on grounds Nos. 1 – 8 on the face of the application and further supported by supporting affidavit by Mercy Nyakio Mburu sworn on 5th December 2018.

3. The petitioner is opposed to the Applicants notice of motion dated 5th December 2018 and in doing so has filed grounds of opposition listing 9 grounds thereto and a Replying affidavit dated 29th March 2019 sworn by Nixon Murathi Kiratu sworn on even date.

4. The Respondents are also opposed to the application and in doing so have filed a Replying affidavit by **No.78927 C.P** Peter Kiptoo sworn on 29th April 2019.

5. The Applicants filed their written submissions dated 11th March 2019. On 13th March 2019, the petitioner filed his submissions on 1st April 2019 whereas the Respondents' submissions were filed on 30th April 2019.

6. I have very carefully considered the Applicants application, the Replying affidavits, grounds of opposition and parties rival submissions and the issues arising thereto for consideration can be summed up as follows:-

a) Whether or not the application meets the threshold for setting aside the exparte orders issued on 10th August 2018?

b) Whether or not the court can order preservation of the motor vehicle subject of this suit pending hearing and determination of the petition?

c) Whether or not the application meets the threshold for setting aside the exparte orders issued on 10th August 2018?

7. The Applicants filed an application to be enjoined as interested parties on 30th November 2018 and the application was granted on 3rd December 2018; however before the Applicants were enjoined as interested parties an order had been issued *expate* on 10th August 2018 as the 3rd Respondent, the Attorney General, was served with the petition and hearing notice on the same day at 9.13 a.m. The Respondents never got the opportunity to present the facts in respect of their non-attendance and as such the Respondents urge the petitioner deliberately choose not to disclose to the court of the late service and for such failure the court proceeded to issue orders which the Respondents urge were prejudicial to the Respondents and interested parties.

8. Similarly as the Applicants were then not parties to the suit they did not have an opportunity to participate in the hearing of the application culminating to the conservatory orders being issued. The orders issued on 10th August 2018, have adversely affected fundamental rights of the Applicants in that their claim over ownership of the motor vehicle registration **KCM 707T** was not considered before adverse orders against their claim to the motor vehicle were issued.

9. The Constitution of Kenya as the supreme law of the land and as the guiding pillar in legal matters provides for fair hearing, treatment and upholding of individual rights and equal treatment of all under the law and in delivery of justice. Under **Article 159(2) (a) of the Constitution**, the courts in exercising judicial authority are guided by principle of doing justice to all, irrespective of their status. The Applicants whether they were parties as of 10th August 2018, or not, having now been enjoined as interested parties should be treated fairly and be afforded an opportunity to be heard on their claim. The fact that an *ex-parte* order was made before they were enjoined in the suit cannot be a bar to have them granted an opportunity to ventilate their claim and the same to be considered applying the guiding principles as enshrined in our constitution.

10. **Article 40 (1) (a) & (b) of the constitution** provides thus:

"(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

(a) Of any description; and

(b) In any part of Kenya."

11. On setting aside of judgment or orders, **Order 12 Rule 7 of the Civil Procedure Rules** provides:-

"Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just."

Further the provision is buttressed by **Order 51 Rule 15 of the Civil Procedure Rules** which provides:-

"The court may set aside an order made ex parte"

The above provision of the Civil Procedure Rules clearly provides for setting aside *ex-parte* orders. The orders sought to be set aside were made in absence of the Respondents, who have given reasons for their absence and when interested parties were not yet on record. It would be improper to maintain an order issued when a party had not been enjoined as an interested party; as this would amount to condemning someone who was not aware of the matter and who had no opportunity to file response unheard. Secondly the petitioner herein failed to disclose to the court the issues relating to the vehicle being repossessed by the Respondents. I am of the view, that had all facts of this matter been laid before the learned trial Judge, the order might not have been granted in absence of the interested parties and the Respondents.

12. I am alive to the fact that in exercise of the discretion and in doing substantive justice, the courts have no limits or restrictions on Judges direction except that it should be based on such forms as may be just because the main concern of the court is to do justice to the parties and

that the discretionary powers should be exercised judicially and not arbitrary. The courts hands are never tied as long as the court is acting within the law and not arbitrary. The discretionary power to set aside an *ex parte* judgment or order does not cease to apply simply because a decree has been extracted. Unfairly obtained *ex parte* judgment or order should not be allowed to stand once the applicant has demonstrated lack of service or having not been a party to a suit in which adverse orders has been issued without it being aware of the matter or being involved.

13. In the case of **Wachira Karani vs Bildad Wachira (2016) eKLR** in allowing an application to set aside an *ex parte* judgment the court held that:-

"The rationale for this rule lies largely on the premise that an *ex parte* judgment is not a judgment on the merits and where the interests of justice are such that the defaulting party with sound reasons should be heard then that party should indeed be given a hearing."

14. I find, that if the application is not allowed the 1st and 2nd interested parties shall stand to lose the subject motor vehicle without having been given fair hearing as enshrined in Article 50 of the Constitution of Kenya. If the interested parties are denied an opportunity to be heard justice shall not be done and seen to be done.

15. In the case of **The King vs The General Commissioners for the Purposes of the Income Tax for the District of Kensington [1917] 1 K.B. 486** the Court laid down the legal principle that *ex parte* applicant must make a full and fair disclosure of all material facts. Warrington LJ had the following to the say at page 509:-

"It is perfectly well settled that a person who makes an *ex parte* application to the Court that is to say, in the absence of the person who will be affected by that which the Court is asked to do is under an obligation to the Court to make the fullest disclosure possible of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the said proceedings, and he will be deprived of any advantage he may have already obtained by means of an order which has thus wrongly been obtained."

16. In the instant matter, the petitioner failed to disclose to Court or even through his petition, that he was aware, that the motor vehicle he claimed ownership of was proceeds of stolen goods (*see Respondent's exhibit marked "PK 5"*), he failed to disclose that the Interested Party herein also claimed ownership of the said motor vehicle, that he sought the Court to declare him as the owner, and even deliberately choose to omit the Interested Party as parties to the petition.

17. In **Sidhu & another vs Memory Corporation PLC No. CHANI 1999/0636/A3** the Court of Appeal in England had the following to say about material non-disclosure and misrepresentation of facts at the *ex parte* stage:

"In the context of what should be disclosed to the Court on a without notice application, the distinction between facts and law is not clear-cut. Many of the authorities already cited refer almost interchangeable to non-disclosure of 'material facts' or 'relevant matters.' Little weight can be attached to these slight variations in language. But some statements of principle of full disclosure extend to what the Court was told about matters of law."

18. In **Uhuru Highway development limited vs Central Bank of Kenya & others [1995] eKLR** the Court of Appeal of Kenya held that the foregoing principles of full disclosure of all material facts in *ex parte* applications apply in Kenya in the same way as England. The Court therefore proceeded to adopt the principles set out in **Republic vs Kensington Income Tax Commissioner and Brink's MAT Ltd vs Elcombe** in upholding the decision of the High Court whereby *ex parte* injunction was declined due to non-disclosure of material facts.

19. The petitioner submissions dealt with an issue of review notwithstanding the interested parties are seeking setting aside and such I did not find the submission very relevant to the application.

20. In view of the above and having considered the facts in support of the application and in opposition, I am satisfied that the interested parties have met the threshold to warrant setting aside *ex parte* judgment and/or orders.

B) Whether or not the court can order preservation of the motor vehicle subject of this suit pending hearing and determination of the petition?

21. The ownership of the motor vehicle in this petition is in dispute between the interested parties and the petitioner. The 1st and 2nd Respondents are investigating the case with a view of tracing one Mr. Hashima, who is said to have sold the vehicle to the petitioner and who is alleged to have fraudulently acquired the motor vehicle from the interested parties.

Article 23(3) of the Constitution of Kenya 2010 affords a party to seek relief, including temporary relief, amongst conservatory orders and an order of injunction. The Article gives a court wide and unrestricted powers which are inclusive rather than exclusive to give appropriate orders and grant remedies as the situation demand. This matter is handled bearing in mind the need to do substantive justice to both parties. I find in the interest of substantive justice to all parties herein, the court can order preservation of the motor vehicle subject of this suit pending hearing and determination of the petition herein.

22. The upshot is that the interested parties application dated 5th December 2018 is meritorious. I proceed to make the following orders.

a) The orders issued on 10th August 2018 be and are Hereby set aside pending hearing and final determination of the petition.

b) The interested parties are hereby granted 21 days from the date of this ruling to file their respective responses to the petition.

c) An order be and is hereby issued for preservation of the motor vehicle KCM 707T Toyota Passo subject of the suit at Thika Police Station pending hearing and determination of this petition.

d) Costs of the Application be in the cause.

Dated, signed and delivered at Nairobi this 20th day of June, 2019.

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J .A. MAKAU

JUDGE